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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221689
Party	Plaintiff 3M Company
Correspondence Address	WENDY C LARSON PIRKEY BARBER PLLC 600 CONGRESS AVENUE, SUITE 2120 AUSTIN, TX 78701 UNITED STATES wlarson@pirkeybarber.com, bbarber@pirkeybarber.com, eolson@pirkeybarber.com, tmcentral@pirkeybarber.com
Submission	Other Motions/Papers
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Signature	/WCL/
Date	11/04/2015
Attachments	res to mtn 437.pdf(1676004 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3M Company,	§	
	§	
Opposer,	§	
	§	
v.	§	Opposition No. 91221689
	§	
GabRy, Inc.,	§	
	§	
Applicant.	§	

OPPOSITION TO APPLICANT'S MOTION TO SET ASIDE DEFAULT[1] AND FOR LEAVE TO FILE A LATE ANSWER

Opposer 3M Company ("3M") opposes Applicant's motion to set aside default and for leave to file a late answer (the "Motion"). As discussed herein, Applicant has failed to show good cause to set aside its default pursuant to Fed. R. Civ. P. 55(c), and has misrepresented the parties' communications in its Motion. 3M thus requests that the Motion be denied, and default judgment be entered.

Background

The parties reached a settlement agreement in principle on all but one term as of January 7, 2015. Declaration of Wendy C. Larson ("Larson Decl.") at ¶ 2. At that time, Applicant indicated it would respond with its position with respect to that term. *Id.* However, despite multiple follow-up communications sent by 3M's counsel on at least March 16, April 1, April 22, April 27, June 3, June 8, July 31, August 7, August 10, August 20, August 27, and September 3, 2015, and despite numerous promises to do so, Applicant has yet to substantively respond regarding that one outstanding term. *Id.* at ¶3.

[1] While the document is entitled "Response to Notice of Default Judgment" the content appears to be a motion to set aside default.

Applicant Has Failed to Show Good Cause

An entry of default may be set aside upon a showing of good cause. Fed. R. Civ. P. 55(c); TBMP 312.02. Applicant, however, has failed to meet even this low standard. *See DeLorme Publishing Co v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (although no prejudice to opposer was shown, and while meritorious defense was shown, Board granted motion for default judgment where applicant filed its answer six months late); *see also In re Durango Georgia Paper Co.*, 314 B.R. 881 (Bankr. S.D. Ga. 2004) (denying motion to set aside default, finding defendant's excuse for failing to answer was that it "thought it had submitted a counterclaim" to be insufficient). Decision attached as Ex. A to Larson Decl. at ¶4.

Applicant is not pro se, is not a foreign entity, has not claimed service was improper, nor asserted any other excuse that courts commonly accept as a showing of "good cause." Applicant was well aware of its August 7, 2015 answer deadline, and gives no reasonable excuse for failing to answer by that date. While Applicant claims "on August 5, 2015 another short extension was requested of the Opposer by email, however, no response was received until August 10, 2015," this statement is inaccurate. Applicant's counsel emailed 3M's counsel on August 5, but did not ask for an extension then; rather, she sent another email after 5 p.m. on August 7 - the deadline for Applicant's answer, and a Friday - requesting more time, and 3M's counsel responded the next business day (Monday, August 10). See Email attached as Ex. B to Larson Decl. at ¶5. Of course, it was Applicant's obligation to comply with the deadline even without 3M's response. Moreover, Applicant provides no acceptable excuse for waiting *nearly four months after that* to address this issue. The excuse that the TTAB's electronic filing system "prohibited" filing a motion to extend time is analogous to the Applicant's failed excuse in *DeLorme* that it thought the opposer's filing was incomplete. As the Board said in that instance, "at the very least, [the

applicant] could have contacted the Board … by telephone or in writing to inquire" about the issue. *DeLorme* at 1223 (emphasis in original). Moreover, Applicant's statement that "additional delays from the end of August until now have been the result of attempts to resolve the remaining outstanding issue…" (Motion at 2) is baseless - other than 3M's counsel following up yet again seeking Applicant's position on the one remaining issue, there have been no further settlement discussions.

The facts do not support a conclusion that the Applicant has good cause to set aside default. Consequently, 3M requests that the Motion be denied.

Respectfully submitted,

Date: November 4, 2015

William G. Barber
Wendy C. Larson
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Austin, Texas 78701
(512) 322-5200
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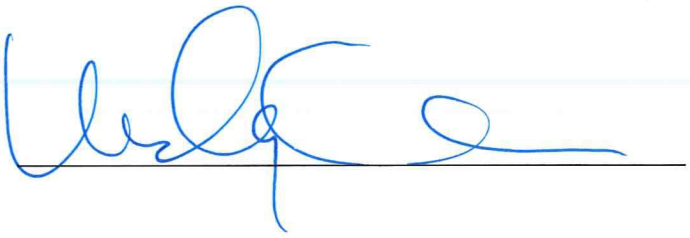
wlarson@pirkeybarber.com

ATTORNEYS FOR OPPOSER
3M COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via First Class Mail, postage prepaid, to Applicant's attorney of record at the address below on November 4, 2015.

Lisa M. Dawson
18 Webelo Place
Palm Coast, FL 32164-7769



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3M Company,	§	
	§	
Opposer,	§	
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v.	§	Opposition No. 91221689
	§	
GabRy, Inc.,	§	
	§	
Applicant.	§	

DECLARATION OF WENDY C. LARSON

I, Wendy C. Larson, make the following declaration:

1. I am a Member of the law firm of Pirkey Barber PLLC in Austin, Texas, and am one of the attorneys representing Opposer 3M Company ("3M") in this action.

2. The parties reached a settlement agreement in principle on all but one term as of January 7, 2015. At that time, Applicant indicated it would respond with its position with respect to that term.

3. I sent multiple follow-up communications to Applicant's counsel on at least March 16, April 1, April 22, April 27, June 3, June 8, July 31, August 7, August 10, August 20, August 27, and September 3, 2015, but despite numerous promises to do so, Applicant has yet to substantively respond regarding that one outstanding term.

4. Attached hereto as Exhibit A is a copy of *In re Durango Georgia Paper Co.*, 314 B.R. 881 (Bankr. S.D. Ga. 2004).

5. Attached hereto as Exhibit B is a true and correct redacted copy of an email string between me and Applicant's counsel with emails dated July 31, 2015, August 5, 7, and 10, 2015.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Austin, Texas on November 4, 2015.

Wendy C. Larson

EXHIBIT A

tion to Dismiss filed by The Coastal Bank of Georgia is granted.

FURTHER ORDERED that Debtors are barred from refiling any case under Title 11 for a period of 180 days after the entry of and finality of this Order.

In the matter of DURANGO GEORGIA PAPER COMPANY, Durango Georgia Converting Corporation, Durango Georgia Converting, LLC, Debtors.

Durango Georgia Paper Company, Plaintiff,

v.

Dave King Paper Sales and Consulting, Inc., Defendant.

Bankruptcy No. 02–21669.
Adversary No. 03–2053.

United States Bankruptcy Court,
S.D. Georgia,
Brunswick Division.

Feb. 26, 2004.

Background: Chapter 11 debtor-paper company filed adversary complaint against buyer of paper, asserting claims for breach of contract, promissory estoppel, unjust enrichment, and violation of the Uniform Commercial Code (UCC), and, after buyer failed to plead or otherwise defend, an entry of default was filed. Buyer moved to set aside the default.

Holding: The Bankruptcy Court, Lamar W. Davis, Jr., Chief Judge, held that buyer failed to show "good cause" to set aside the entry of default.

Motion denied.

See also 2004 WL 2181772, 314 B.R. 885.

1. Bankruptcy ⇐2165

Rule governing the setting aside of defaults imposes a very low standard, which is generally met any time a court finds that the default was not the result of gross neglect, the party in default has a meritorious defense, and the non-defaulting party will not be substantially prejudiced by the reopening. Fed.Rules Bankr. Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

2. Bankruptcy ⇐2165

Where only an entry of default had been filed and no final judgment had been entered, it was proper for the bankruptcy court to apply the "good cause" standard of the rule governing the setting aside of defaults, rather than the more stringent "excusable neglect" standard of the rule governing relief from judgment. Fed. Rules Bankr.Proc.Rules 7055, 9024, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rules 55(c), 60(b), 28 U.S.C.A.

3. Bankruptcy ⇐2165

Worth considering in deciding whether to set aside an entry of default is whether the defaulting party took prompt action to vacate the default. Fed.Rules Bankr. Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

4. Bankruptcy ⇐2165

When a party moves to set aside an entry of default, doubtful cases are to be resolved in favor of the movant so that cases may be decided on their merits. Fed.Rules Bankr.Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

5. Bankruptcy ⇐2165

Adversary defendant, which had failed to plead or otherwise defend complaint filed against it by Chapter 11 debtor, failed to show "good cause" to set aside the entry of default; defendant's failure to respond was the result of gross neglect, as its only explanation for the default was its unsupported contention that it thought it had submitted a counterclaim, defendant alleged no evidence of a factual basis for a meritorious defense, debtor would be substantially prejudiced by reopening the entry of default, as it would incur greater litigation expenses, and, though defendant acted promptly in moving to set aside the default, its motion was entirely devoid of any factual assertions to justify the relief sought, and it failed to supplement the record when given the opportunity. Fed. Rules Bankr.Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

6. Bankruptcy ⇐2165

In determining, for purposes of defendant's motion to set aside entry of default, whether defendant might assert a meritorious defense to the action on which it has defaulted, defendant has a higher burden after default has been entered than if it had filed a timely answer; thus, defendant cannot merely rely on general denials and conclusory statements but, instead, must allege some evidence of a factual basis for a meritorious defense before the court can seriously consider opening the default. Fed.Rules Bankr.Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

7. Bankruptcy ⇐2165

In determining whether to grant motion to set aside entry of default, prejudice to non-movant must be balanced against the policy favoring resolution of disputes on the merits. Fed.Rules Bankr.Proc. Rule 7055, 11 U.S.C.A.; Fed.Rules Civ. Proc.Rule 55(c), 28 U.S.C.A.

8. Bankruptcy ⇐2165

Although normally the expense of litigation by itself would not be a sufficient showing of prejudice to plaintiff to warrant denial of defendant's motion to set aside entry of default, the expense plaintiff incurs in prosecuting a suit in which defendant has defaulted and presented no meritorious defense, unduly prejudices plaintiff. Fed.Rules Bankr.Proc.Rule 7055, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 55(c), 28 U.S.C.A.

W. Brooks Stillwell, Hunter, Maclean, Exley & Dunn, Savannah, GA, for debtors.

MEMORANDUM AND ORDER ON MOTION TO SET ASIDE DEFAULT JUDGMENT

LAMAR W. DAVIS, JR., Chief Judge.

Durango Georgia Paper Company ("Durango") consented to an involuntary petition for relief under Chapter 7 of the Bankruptcy Code on October 29, 2002, and converted its case to Chapter 11 on November 19, 2002. On September 15, 2003, Durango initiated an adversary proceeding against Dave King Paper Sales and Consulting, Inc., ("Defendant"). An entry of default was filed against Defendant in the adversary complaint on November 18, 2003. On November 21, Defendant filed a Motion to Set Aside Default Judgment on which this Court now rules. A hearing on Defendant's motion was held on November 21, 2003. Based upon the pleadings and arguments presented, I hold that Defendant's motion should be denied.

FACTS

Durango asserted causes of action including breach of contract, promissory estoppel, unjust enrichment, and violation of the Uniform Commercial Code in the September 15, 2003, adversary complaint against Defendant. Durango's allegations relate to paper that Defendant offered to purchase from Durango for the purpose of selling to paper converting customers. Defendant agreed to pay Durango a set price, immediately upon Defendant's receipt. While Defendant received delivery of the paper and has apparently sold that paper to converting customers for profit, Defendant has failed to pay Durango for the paper supplied.

On November 12, 2003, Durango provided this court with the affidavit of its counsel, Robert K. Imperial, which detailed Durango's efforts to properly serve Defendant in the adversary complaint. Durango first attempted to serve Defendant by mail at 3669 Cook Road, Loganville, Georgia 30249. However, the mail sent to the aforementioned address was returned to Durango. On October 3, 2003, a summons was reissued to Defendant at the address of 1694 Knox Chapel Road, Social Circle, Georgia 30025. Service at this address was perfected on Defendant as its registered agent, Mr. Dave King ("King"), signed the return receipt on October 8, 2003. The summons stated that Defendant had until November 3, 2003, to file its answer with the Court. In its December 10, 2003, Response to Defendant's Motion to Set Aside, Durango stated that King called the Durango's counsel on behalf of Defendant in order to discuss the adversary proceeding on October 28, 2003. Durango's counsel returned the call, but King was unavailable and never returned the call. Subsequently, Defendant failed to plead or otherwise defend Durango's adversary complaint. Thus, this Court filed an Entry of Default on November 18, 2003; a final judgment has yet to be entered.

Defendant's counsel appeared at the November 21 hearing. He stated that King told him that he thought he submitted a counterclaim indicating the paper Defendant received was defective. Based on the charge of defective material, Defendant believed that the claims of the adversary complaint would be offset. At the hearing, Defendant's counsel also stated that he desired to supplement the record in order to prove that Defendant's failure to respond was the result of mistake and inadvertence.

At the November 21 hearing, I allowed Defendant three weeks to supplement the record and Durango two weeks to respond. On December 10, Durango filed its response. Defendant did not supplement the record within the proscribed time and still has not done so.

Durango contends that Defendant has failed to show "good cause" for setting aside the entry of default. Further, Durango believes Defendant's failure to respond was willful and alleges that while Defendant acted promptly in seeking to set aside the entry of default, it has not proffered a meritorious defense. Finally, Durango believes that it will be prejudiced if the default is set aside as it will be enforced to incur the additional costs of litigation.

DISCUSSION

[1–4] Bankruptcy Rule 7055 incorporates Federal Rule of Civil Procedure 55(c), which provides that, "[f]or good cause shown the court may set aside an entry of default." This provision imposes a very low standard, which is generally met any time a court finds that the default was not the result of gross neglect, the party in default has a meritorious defense,

and the non-defaulting party will not be substantially prejudiced by the reopening.[1] *See Johnson v. Alliance Mortgage & Investment Co. (In re Johnson)*, No. 93–4165, p. 4, 1994 WL 16005201, *2 (Bankr.S.D.Ga. May 24, 1994) (Davis, J.) (*citing* C. Wright and W. Miller, Federal Practice and Procedure, § 2697). Also worth considering is whether the defaulting party took prompt action to vacate the default. *See, e.g. Cielinski v. Sandlin (In re Sandlin)*, No. 01–40209, 00–4016, 2002 WL 934564, *2 (Bankr.M.D.Ga. Feb.19, 2002) (Laney, J.); *American Express Travel Related Services, Inc. v. Jawish (In re Jawish)*, 260 B.R. 564, 567 (Bankr.M.D.Ga.2000) (Walker, J.). In general, it has been held that doubtful cases are to be resolved in favor of the party moving to set aside the default so that cases may be decided on their merits.

[5] In considering whether the default is the result of "gross neglect," this Court addressees Defendant's possible culpability and excuse for defaulting. Here, Defendant's only explanation for the default was that it thought it submitted a counterclaim. Based on its claim that Durango supplied defective materials, Defendant allegedly thought that it did not have to file an answer to the adversary complaint. However, Defendant has not provided this Court with any documentation or support for its counterclaim. There is no dispute that Defendant was properly served and was aware of the adversary complaint. Based on the facts, I have no option other than to find that Defendant's failure to respond was the result of gross neglect.

[6] In determining whether Defendant might assert a meritorious defense to the action on which it has defaulted, Defendant has a higher burden now that default has been entered than if it filed a timely answer. *See Cielinski v. Kitchen (In re Tires and Terms of Columbus, Inc.)*, 262 B.R. 885, 889 (Bankr.M.D.Ga.2000) (Laney, J.) (*citing Rogers v. Allied Media, Inc. (In re Rogers)*, 160 B.R. 249, 254 (Bankr. N.D.Ga.1993)). Thus, Defendant cannot merely rely on the general denials and conclusory statements. Instead, Defendant must allege some evidence of a factual basis for a meritorious defense before the Court can seriously consider opening the default. *See Turner Broadcasting System, Inc. v. Sanyo Electric, Inc.*, 33 B.R. 996, 1002 (N.D.Ga.1983) *aff'd* 742 F.2d 1465 (11th Cir.1984) (denying motion to set aside entry of default where none of proposed defenses appeared meritorious). In its motion, Defendant pled in relevant part as follows:

> 1. An answer was not filed in this case due to mistake, excusable neglect or other grounds warranting relief from judgment including in the interest of equity, fairness and public policy.
>
> 2. The defendant will show that there is "good cause" to set aside the default judgment.
>
> Motion to Set Aside Default Judgment (November 21, 2003).

While Defendant reserved the right to supplement its motion, it has not done so. Because all that I have to rely on is the above language from Defendant's motion and similar arguments made at the November 21 hearing, there is no basis for

1. Because only an entry of default has been filed and no final judgment has been entered, it is proper for this court to apply the "good cause" standard of F.R.Bankr.P. 7055 rather than the more stringent "excusable neglect" standard of F.R.Bankr.P. 9024 which incorporates F.R.Civ.P. 60. *See* F.R.Civ.P. 55(c)("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).")

finding that Defendant has asserted a meritorious defense.

[7, 8] Durango has offered no specific showing of prejudice beyond the expense of additional court appearances and the postponement of the relief that Durango seeks to enjoy. Here, prejudice to Durango must be balanced against the policy favoring resolution of disputes on the merits. Normally, the expense of litigation by itself would not be a sufficient showing of prejudice. However, it has been held that, "the expense a plaintiff incurs in prosecuting a suit in which the defendant has defaulted and presented no meritorious defense, unduly prejudices the plaintiff." *Turner Broadcasting System*, 33 B.R. at 1003. Because Defendant has failed to present a meritorious defense, I hold that Durango will be substantially prejudiced by reopening the entry of default.

In this case default was entered on November 18, 2003, and Defendant filed its motion to set aside on November 21. Defendant clearly acted promptly and this fact would ordinarily weigh in its favor. However, as discussed, Defendant's motion was entirely devoid of any factual assertions that would justify my setting aside the entry of default. Furthermore, Defendant was given more than ample opportunity to supplement the record, but has failed to do so. Because Defendant failed to supplement the record, it has not met its minimal burden in justifying its motion to set aside.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Defendant's Motion To Set Aside Default Judgment is DENIED.

In the matter of DURANGO GEORGIA PAPER COMPANY, Durango Georgia Converting Corporation, Durango Georgia Converting, LLC, Debtors.

No. 02–21669.

United States Bankruptcy Court,
S.D. Georgia,
Savannah Division.

June 24, 2004.

Background: Creditor filed post-bar-date motion to amend its claim from unsecured to secured. Unsecured creditors committee objected.

Holding: The Bankruptcy Court, Lamar W. Davis, Jr., Chief Judge, held that under the totality of the circumstances, it was not equitable to allow creditor to amend its proof of claim more than a year after the bar date.

Motion denied.

See also 2004 WL 2181767, 314 B.R. 881 and 297 B.R. 316.

1. Bankruptcy ⇐2903

In a bankruptcy case, amendment to a claim is freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity, or to plead a new theory of recovery on the facts set forth in the original claim.

2. Bankruptcy ⇐2903

Amendment to a claim should be allowed only when the original claim provided notice to the bankruptcy court of the existence, nature, and amount of the claim and that it was creditors' intent to hold the estate liable.

EXHIBIT B

Wendy Larson

From: Wendy Larson
Sent: Monday, August 10, 2015 3:56 PM
To: 'Lisa Dawson-Andrzejczyk'
Cc: PB File Copy
Subject: RE: URGENT: [redacted](3MTM437)

Hi Lisa,
We can agree to a short extension, but please let us know what time frame you have in mind. Please also let us know by what date we can expect [redacted]

Best regards,
Wendy

From: Lisa Dawson-Andrzejczyk [mailto:lisamdawsonesq@gmail.com]
Sent: Friday, August 07, 2015 5:25 PM
To: Wendy Larson
Subject: Re: URGENT: [redacted](3MTM437)

Wendy,

The client needs a little more time to meet [redacted] Would you be willing to agree to another short extension?
On Wed, Aug 5, 2015 at 8:14 PM Lisa Dawson-Andrzejczyk <lisamdawsonesq@gmail.com> wrote:

> I can and do understand. They are meeting tomorrow I believe.
> On Fri, Jul 31, 2015 at 11:45 AM Wendy Larson <wlarson@pirkeybarber.com> wrote:
>
> > Lisa,
> >
> > I'm following up on this. As I'm sure you can understand, this delay is frustrating. We look forward to [redacted] as soon as possible.
> >
> > Best regards,
> >
> > Wendy